

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 01-0011
USE TAXES
For the 1998 Tax Year**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Applicability of the Indiana Use Tax on Construction Materials Purchased Out-of-State.

Authority: IC 6-2.5-2-1; IC 6-2.5-3-2; 45 IAC 2.2-3-16; Ill. Admin. Code tit. 86, § 130.605(a)(1)-(2); Ill. Admin. Code tit. 86, § 130.605(b); Ill. Admin. Code tit. 86, § 130.605(d).

The taxpayer protests the Department's decision to assess use tax on construction materials purchased in Illinois, transported to Indiana, and used to construct a building within the state.

II. Abatement of the Ten-Percent Negligence Penalty.

Authority: IC 6-8.1-5-1(b); IC 6-8.1-10-2.1; IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-(c).

The taxpayer has asked that the Department exercise its discretionary authority to abate the ten-percent negligence penalty.

III. Request for Abatement of Interest.

Authority: IC 6-8.1-10-1; IC 6-8.1-10(a)

Taxpayer has protested the imposition of interest on assessed taxes and requests that the interest that has accumulated on those taxes be abated.

STATEMENT OF FACTS

Taxpayer is a general contractor headquartered in Illinois. The taxpayer builds hotels in Indiana on behalf of various franchisees. Taxpayer purchased construction materials – described as a “basic framing package and loose lumber” – from an Illinois vendor. The vendor transported the construction materials to the Indiana site. The invoice for the supplies indicates that the F.O.B. point was at the site of the Illinois vendor.

DISCUSSION

I. Applicability of the Indiana Use Tax on Construction Materials Purchased Out-of-State.

The taxpayer protests the imposition the state’s use tax on the purchase of building materials acquired in Illinois, transported into Indiana, and used to construct a building located in the state. The taxpayer argues that, because it paid Illinois sales tax, it should not be responsible for Indiana use tax.

Indiana imposes a use tax on the “storage, use, or consumption of tangible personal property in Indiana . . . regardless of the location of that transaction or of the retail merchant making that transaction.” IC 6-2.5-3-2. The tax is imposed on transactions that occur outside of Indiana that would be taxable if they occurred within Indiana but only if property is stored, used or consumed in Indiana. IC 6-2.5-2-1.

The imposition of the use tax, on purchases occurring outside the state, is qualified pursuant to 45 IAC 2.2-3-16 which allows an Indiana credit for “the amount of any sale, purchase, or use tax paid to any other state . . . with respect to the tangible personal property on which Indiana use tax applies.”

The taxpayer has provided documentary evidence, consisting of a copy of a check issued to taxpayer’s Illinois vendor, which substantiates payment of the vendor’s original invoice. That invoice, and taxpayer’s corresponding cancelled check, conforms to the amount billed for the construction materials and for the amount of Illinois sales tax assessed against the purchase of those construction materials.

The taxpayer has also provided information purporting to establish that the Illinois sales tax (Retailers’ Occupation Tax) was due and payable for taxpayer’s purchase of construction materials. Pursuant to Ill. Admin. Code tit. 86, § 130.605 (2000), “Where tangible personal property is located in this State at the time of its sale . . . and then delivered in Illinois to the purchaser, the seller is taxable if the sale is at retail. 1) the sale is not deemed to be in interstate commerce if the purchaser or his representative receives the physical possession of such property in this State. 2) This is so notwithstanding the fact that the purchaser may, after receiving physical possession of the property in this state, transport or send the property out of the state for use outside the State or for use in the conduct of interstate commerce.” Ill. Admin. Code tit. 86, § 130.605(a)(1)-(2).

However that same administrative code also makes exceptions for certain purchases made within Illinois. Pursuant to Ill. Admin. Code tit. 86, § 130.605(b), “The tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in [Illinois] to a point outside [Illinois], not to be returned to a point within [Illinois].” Under the terms of taxpayer’s agreement, the Illinois vendor was obligated to transport the construction materials to the Indiana construction site. The fact that the parties designated Illinois as the F.O.B. point is irrelevant in this analysis because, under Ill. Admin. Code tit. 86, § 130.605(d), “[t]he place at which title to the property passes to the purchaser is immaterial” Accordingly, taxpayer’s purchase of construction materials, designated for delivery and ultimate consumption within the state of Indiana, was not subject to the Illinois sales tax because “[s]ales of the type described in [Ill. Admin. Code tit. 86, § 130.605(b)] are deemed to be within the protection of the Commerce Clause of the Constitution of the United States.” Ill. Admin. Code tit. 86, § 130.605(d).

Therefore, because Illinois sales tax was not due and payable on taxpayer’s purchase of the construction materials destined for Indiana, taxpayer is not entitled to an Indiana credit under 45 IAC 2.2-3-16. Instead, the purchase of the construction materials is subject to Indiana use tax under IC 6-2.5-3-2 because the construction materials constituted tangible personal property used or consumed in Indiana.

FINDING

Taxpayer’s protest is respectfully denied.

II. Abatement of the Ten-Percent Negligence Penalty.

The taxpayer has requested that the ten-percent negligence penalty, assessed by audit under authority of IC 6-8.1-10-2.1, be abated. The Department’s regulations provide guidance in determining those instances in which imposition of the ten-percent negligence penalty is appropriate. 45 IAC 15-11-2(b) defines negligence as “the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer.” The taxpayer’s negligence may be inferred from its “carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations.” *Id.* IC 6-8.1-10-2.1(d) requires that the Department waive the penalty upon a showing that the taxpayer’s failure to pay the tax delinquency was due to “reasonable cause and not due to willful neglect.” In order to establish “reasonable cause,” 45 IAC 15-11-2(c) requires that the taxpayer demonstrate that it “exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed”

The taxpayer has failed to set forth any basis whatsoever establishing that it exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Taxpayer's bare assertion, requesting that the penalty be abated, is insufficient to overcome the presumption of correctness afforded the audit's determination under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is respectfully denied.

III. Request for Abatement of Interest.

Taxpayer protests the imposition of interest on assessed taxes and request that the interest that has accumulated on those taxes be abated. Under IC 6-8.1-10-1(a), if a person incurs a deficiency upon a determination by the Department, "the person *is* subject" to interest on the nonpayment.

The Department has no discretion regarding the imposition of interest. Under IC 6-8.1-10-1, interest is not abated for any reason.

FINDING

Taxpayer's protest and request for abatement is respectfully denied.